

## George Mackenzie on Scottish Judicial Rhetoric

*Abstract:* George Mackenzie's "What Eloquence is fit for the Bar" (1672), perhaps unique in the early modern literature of Scots law, provides access to the state of judicial rhetoric in post-Restoration Scotland. This essay summarizes the contents of the essay and briefly relates it to his career and other writings. It shows that Mackenzie conceived of eloquence as a site of struggle for personal, professional, and international status.

**S**ir George Mackenzie of Rosehaugh was as an advocate, member of parliament, founder of the Advocates' Library, and popularly known as "bluidy Mackenzie" for his prosecution of Covenanters while serving as Lord Advocate for Charles II beginning in 1677.<sup>1</sup> A significant figure in Scottish political and legal history, Mackenzie wrote two important works on Scots law.<sup>2</sup> As well, he wrote two essays on judicial rhetoric. The first, "What Eloquence is fit for the Bar," preceded sample pleadings published in *Pleadings in some remarkable cases before the Supreme Court of Scotland since 1661*,

---

<sup>1</sup>Robert Chambers, *Traditions of Edinburgh* (Edinburgh: Chambers, 1967) p. 224; George W. T. Omond, *The Lord Advocates of Scotland: From the Close of the Fifteenth Century to the Passing of the Reform Bill*, vol. 1 (Edinburgh, 1883) pp. 213–24; Alex M. Cain, "Sir George Mackenzie and the Art of Librarianship," in *Oratio Inauguralis In Aperienda Jurisconsultorum Bibliotheca*, by Sir George Mackenzie, eds. John W. Cairns and Alex M. Cain (Edinburgh: Butterworths, 1989) pp. 36–45.

<sup>2</sup>He wrote an important work on Scottish criminal law, and his *Institutions of the Law of Scotland* (1688) served as a university textbook for teaching Scots law until the 1750s (John W. Cairns, "The Moveable Text of Mackenzie: Bibliographical Problems for the Scottish Concept of Institutional Writing," *Critical Studies in Ancient Law, Comparative Law and Legal History*, eds. John W. Cairns and Olivia F. Robinson (Oxford: Hart Publishing, 2001): p. 236; David M. Walker, *The Scottish Jurists* (Edinburgh: Green, 1985) pp. 162–63, 164–66).

to which the Decisions are subjoined (1672).<sup>3</sup> The second, "Idea eloquentiae forensis hodierni" (1681), preceded six sample pleadings published in a work of the same name.<sup>4</sup> I am aware of only four places in scholarship on the history of rhetoric where Mackenzie's essays on rhetoric are mentioned. All mention Mackenzie in passing, three treat only the latter essay in any detail, and two seem to consider it to be an English rhetoric.<sup>5</sup> Nor do legal historians give either of Mackenzie's works on judicial rhetoric much if any attention, probably because they are not sources of Scots law but rather exercises in judicial eloquence.<sup>6</sup> Mackenzie, however, did want to

---

<sup>3</sup>Citations are to the following edition and provided parenthetically in the text: *The Works of that Eminent and Learned Lawyer, Sir George Mackenzie of Rosehaugh*, vol. 1 (Edinburgh, 1716) pp. 9–102. *Pleadings* is in the second part of the volume: "Treatises on the Laws of Scotland, and Pleadings Before Its Supreme Judicatories; With Their Decisions." *Pleadings* was first published in 1672 and reprinted in 1673 and 1704 (F.S. Ferguson, "A Bibliography of the Works of Sir George Mackenzie, Lord Advocate, Founder of the Advocates Library," *Edinburgh Bibliographical Society Transactions* 1 (1935–6) pp. 21–22).

<sup>4</sup>The subtitle is: *Uná cum Actione Forensi ex unaquaque: Juris parte*. It was published in Edinburgh, 1681. For an English translation see Robert Hepburn, *An Idea of the Modern Eloquence of the Bar. Together with a Pleading out of every Part of Law* (Edinburgh, 1711).

<sup>5</sup>William Phillips Sandford, *English Theories of Public Address, 1530–1828* (n.p., 1931) p. 122; Glen McClish, "Henry Fielding, the Novel, and Classical Legal Rhetoric," *Rhetorica* 14 (1996) pp. 415, 435; and Sean Patrick O'Rourke, "The Rhetoric of Law in the Scottish Enlightenment," unpublished PhD diss. U of Oregon, 1992, p. 79. John W. Cairns, "Rhetoric, Language, and Roman Law: Legal Education and Improvement in Eighteenth-Century Scotland," *Law and History Review* 9 (1991) pp. 33–34 focuses on the essay in *Pleadings*.

<sup>6</sup>Neither J. Irvine Smith, "The Rise of Modern Scots Law, 1660–1707," *An Introduction to Scottish Legal History* (Edinburgh: Stair Society, 1958) pp. 44–49, nor James S. Leadbetter, "The Printed Law Reports," *An Introductory Survey of the Sources and Literature of Scots Law* (Edinburgh: Stair Society, 1936) pp. 42–58, for example, lists Mackenzie's works on judicial eloquence among collections of decisions even though both works include cases relevant to titles in Scots law with statements of the decisions. See also Walker, *Jurists*, pp. 164, 168. About some of the cases in *Pleadings* Walker observes: "one suspects that like Cicero's speeches for the defence, they were polished for publication. Some . . . seem rather exercises than discourses delivered in actual cases" (p. 162). Likewise, T. B. Smith describes Mackenzie's *Pleadings* as being "for the instruction of Scottish lawyers" ("The Influence of the 'Auld Alliance' with France on the Law of Scotland," *Studies Critical and Comparative* (Edinburgh: Green, 1962) p. 35). John W. Cairns, "George Mackenzie, the Faculty of Advocates, and the Advocates' Library," in *Oratio Inauguralis*, pp. 18–35 is necessary reading. Hugh Ouston's "Cultural Life from the Restoration to the Union," *The History of Scottish Literature, 1660–1800*, vol. 2, ed. Andrew Hook (Aberdeen: Aberdeen University Press, 1987) pp. 11–31 provides a concise but comprehensive account of Mackenzie and other members of the Scottish professional class with attention to the social, economic, political, and

unite law and rhetoric.<sup>7</sup> His essays on judicial rhetoric deserve attention because they may be unique in the early modern literature of Scots law and, as such, provide some access to the state of the art of judicial rhetoric in post-Restoration Scotland as well as rhetoric more generally.<sup>8</sup>

"*Idea eloquentiae forensis hodierni*" contributed to Mackenzie's European reputation.<sup>9</sup> Besides the testimonies of praise included in Mackenzie's *Works* from the likes of Voet, Huber, and the universities of Oxford and Bourges, "*Idea eloquentiae forensis hodierni*" was discussed in the *Journal de Paris* in the same year that it appeared.<sup>10</sup> Gibert included a précis of the essay in his 1719 *Jugemens des Savans sur les Auteurs qui ont traité de la Rhétorique*.<sup>11</sup> Thus was in a manner fulfilled Mackenzie's hope for fame beyond the English-speaking world by publishing his pleadings in Latin.<sup>12</sup>

Mackenzie's earlier essay on judicial rhetoric has not received as much notice as the later essay in Mackenzie's day or since. The fact that it is written in English helps to account for why it did not receive much notice abroad. Mackenzie's allegiance to Charles II and James VII helps to account for why it did not receive much attention in England or Scotland. Because *Pleadings* deals more particularly with Scottish judicial rhetoric, and because this is the subject I hope to illuminate, I will summarize its contents and relate it to

---

religious history of the period. Andrew Lang, *Sir George Mackenzie, King's Advocate, of Rosehaugh: His Life and Times, 1636 (?)–1691* (New York: Longmans, 1909) pp. 318–20 provides a brief summary of "What Eloquence is fit for the Bar."

<sup>7</sup>In his inaugural oration for the Advocates' Library, Mackenzie describes rhetoric, as well as history and criticism, as the handmaidens of jurisprudence (trans. James H. Loudon, rpt. in *Oratio Inauguralis*, p. 73). See also O'Rourke, "The Rhetoric of Law", pp. 79–80. Mackenzie's desire to unite law and rhetoric is rooted in his humanism (Cairns, "Mackenzie," pp. 18, 19, 26).

<sup>8</sup>In his inaugural oration, Mackenzie mentions that only the French have published their pleadings, "which were distinguished alike for eloquence and learning" (p. 66). For a bibliography of French pleadings, see Catherine E. Holmès, *L'Eloquence Judiciaire de 1620 à 1660: Reflet des Problèmes Sociaux, Religieux et Politiques de l'Époque* (Paris: Nizet, 1967). I have found no comparable Scottish collections of pleadings or references to such collections.

<sup>9</sup>Cairns, "Mackenzie," pp. 19–20.

<sup>10</sup>Balthazar Gibert, *Jugemens des Savans sur les Auteurs qui ont traité de la Rhétorique, avec un précis de la doctrine de ces auteurs. Tome III. Et dernier, contenant les maîtres les plus fameux qui ont écrit de l'éloquence dans les derniers temps* (Paris, 1719) p. 150.

<sup>11</sup>On Gibert, see Marc Fumaroli, *L'Age de L'Eloquence: Rhétorique et 'res literaria' de la Renaissance au seuil de l'époque classique* (Genève: Droz, 1980) pp. 2–3.

<sup>12</sup>See the dedication to "*Idea eloquentiae forensis hodierni*" and his inaugural oration (pp. 66, 71).

Mackenzie's career. By doing so we see that rhetoric was a site of struggle for professional, sociopolitical, and international status, and that success in these areas rather than civic goods were rhetoric's *raison d'être*.

## RHETORIC IN MACKENZIE'S TRAINING AND EARLY WORKS

Mackenzie, born in 1636 or 1638 at Dundee in Scotland,<sup>13</sup> first attended King's College, Aberdeen, in 1650; and joined the fourth year's class at St. Leonard's College, St. Andrews, in 1653.<sup>14</sup> At King's College in 1647 the arts curriculum included Vossius' rhetoric and Ramus' dialectic, as well as Aristotle's *Categories*, *Analytics*, and *Logic*; and probably the arts curriculum at St. Andrews was similarly weighted towards Aristotle and involved regular disputations.<sup>15</sup> Mackenzie's training, then, would feature syllogistic reasoning and foster a view of eloquence as primarily a verbal technique and as a way of working on the audience's minds, particularly emotions.<sup>16</sup> After St. Andrews, Mackenzie is said to have attended law school at Bourges in France and perhaps also in the Netherlands.<sup>17</sup> His stay on the continent to study civil law was typical of a Scots advocate's training at this time and into the eighteenth century.<sup>18</sup> This legal training would be in Latin and involve explication of and disputations on themes in Roman law, as well as attention to eloquence.<sup>19</sup> In "*Idea eloquentiae forensis hodierni*" Mackenzie

---

<sup>13</sup>Lang argues for the later date (*Sir George MacKenzie*, p. 22).

<sup>14</sup>Lang, *Sir George MacKenzie*, p. 24.

<sup>15</sup>James Scotland, *The History of Scottish Education: From the Beginning to 1872* (London: University of London Press, 1969) pp. 143, 70–71.

<sup>16</sup>See C.S.M. Rademaker, *Life and Work of Gerardus Joannes Vossius (1577–1649)*, trans. H.P. Doezema (Assen: Van Gorcum, 1981) pp. 179–80 and Thomas M. Conley, *Rhetoric in the European Tradition* (Chicago: University of Chicago Press, 1990) pp. 160–61. In "What Eloquence" Mackenzie describes eloquence as "the true Key of the Passions" (p. 12).

<sup>17</sup>Cairns, "Mackenzie," p. 18.

<sup>18</sup>Alexander Murdoch, "The Advocates, the Law and the Nation in Early Modern Scotland," *Lawyers in Early Modern Europe and America*, ed. Wilfrid Prest (London: Croom Helm, 1981) p. 150; A.C. Black, "The Institutional Writers, 1600–1826," *An Introductory Survey of the Sources and Literature of Scots Law* (Edinburgh: Stair Society, 1936) p. 61; and John C. Gardner, "French and Dutch Influences," *An Introductory Survey*, pp. 226–34.

<sup>19</sup>For an overview of a French advocate's school training, see Holmès, *L'Eloquence Judiciaire*, pp. 18–24.

would recommend the French "Plaidoyez" as models for forming a style.<sup>20</sup>

Mackenzie's interest in style was apparent in his first publication—a novel entitled *Arentina, the Serious Romance* (1660). In "An Apologie for Romances" prefaced to the novel, Mackenzie explains that "it was to form to my self a style that I undertook this Piece."<sup>21</sup> In discussing different kinds of style, Mackenzie's basis of division is professions. The first is "an university style" which involves use of Latin and Greek terms in a manner that interferes with persuasion (p. 9). The second style "is that of moral Philosophers"—short periods and strong sense—which "suits best with Preachers" (p. 9). The third "is that of Barrasters." Significantly, he describes this style as most preferable. This is because it "is flourished with similes" and uses "long winded periods" (p. 9). A fourth style is that of the courtier. In this case "the cadence is sweet, and the epithets well adapted, without any other varnish whatsoever" (p. 10). However, it is susceptible to abuse: he mentions "a ridiculous caball of Ladies at Paris . . . who paraphrase every thing they speak of, terming a mirrour, the conselour of beauty, and a chair, the commoditie of conversation, &c." (p. 10).

Given Mackenzie's attention to different kinds of style, it is not surprising to find him attempting to fashion himself a wit. The English poet John Dryden described Mackenzie as "that noble wit of Scotland."<sup>22</sup> The conceits Mackenzie uses in the preface to *Arentina* and later works, including "What Eloquence," are reminiscent of the kinds of metaphysical conceits found in the poetry of Donne, Jonson, and Cowley, to name just three of the authors of whom Mackenzie approves in his poem *Caelia's Country House and Closet* (1667). In *Religio Stoici* (1663), for example, Mackenzie advises against debate in spiritual matters with this conceit: "none but God's Spirit can decide the Controversy. Matters of Religion and Faith, resembling some curious Pictures, and Optick Prisms, which seem to change Shapes and Colours, ac-

---

<sup>20</sup>Mackenzie recommends that the advocate use his own pleadings, those of Cicero, or those of the French to form his voice to pronunciation of figures (pp. 71–72). See also his inaugural oration (p. 66).

<sup>21</sup>I have used the reprint of "Apologie" by the Augustan Reprint Society in *Prefaces to Four Seventeenth-Century Romances* (Los Angeles: Clark Memorial Library, 1953) p. 10.

<sup>22</sup>Quoted in Cairns, "Mackenzie," p. 19.

cording to the several Stances from which the Aspicient views them."<sup>23</sup>

*Religio Stoici* is in part Mackenzie's response to the civil wars. A key part of the conflict was the crown's attempt to impose episcopacy on Scotland. While Mackenzie was studying in Aberdeen, Dundee was sacked and its citizens massacred.<sup>24</sup> Aberdeen was not sympathetic to Covenanters, and Mackenzie certainly did not sympathize with them.<sup>25</sup> Whereas in "Apologie" Mackenzie's views of a preaching style are relatively superficial and uncritical, three years later in *Religio Stoici* he takes preachers to task for the "Blood-thirsty Zeal, which hath reigned in our Age" (p. 43). Mackenzie blames the knowledge formed by "the Curiosity of School-men, and the Bigotry of Tub-preachers" to be "of all others the least necessary, and the most dangerous" (p. 51).

Prior to *Pleadings*, Mackenzie also published essays on topics such as solitude and gallantry. As Mackenzie reports in *Pleadings*, "When I was too young to write in my own Profession, my Love to my Country tempted me to write *Moral Philosophy*, and to adventure on a *Play* and *Poem*" (p. 10). Certainly patriotic motives were also relevant to his legal publications.<sup>26</sup> At the time Mackenzie wrote "What Eloquence," there were few Scottish legal materials in print.<sup>27</sup> In the preface to *Pleadings* Mackenzie identifies this as a motive for publishing the work: "[t]he Laws of other Nations are opprest, but ours is starv'd. This made me adventure to write these few Sheets" (p. 10).<sup>28</sup> This situation would change less than a decade later

<sup>23</sup>*Works*, vol. 1, p. 42. See also "Apologie," pp. 6, 7. Compare for example Donne's "The Bait," Jonson's "The Houre-Glasse," and especially Cowley's "Ode: Of Wit." For Caelia's Country-House and Closet, see *Works*, vol. 1, p. 17.

<sup>24</sup>J. D. Mackie, *A History of Scotland*, 2nd edn, rev. and ed. Bruce Lenman and Geoffrey Parker (London: Penguin, 1978) p. 224.

<sup>25</sup>David Stevenson, *King's College, Aberdeen, 1560-1641: From Protestant Reformation to Covenanting Revolution* (Aberdeen: Aberdeen University Press, 1990) pp. 105-12; Lang, *Sir George MacKenzie*, pp. 23-24.

<sup>26</sup>See Cairns, "Mackenzie," pp. 20-23.

<sup>27</sup>Walker, *Jurists*, pp. 114-15, 150 n.18. For a brief overview of Scotland and its courts during the Commonwealth, Protectorate, and Restoration, see David M. Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law*, 3rd edn, rev. (Edinburgh: Green, 1969) pp. 153-56.

<sup>28</sup>Mackenzie may have intended *Pleadings* to contribute to the materials of Scots law. He suggests this in a comment in his inaugural oration where he discusses the library's holdings in Scottish municipal law: "Their numbers are small for the reason that the Scottish character finds it more natural to express in forensic speeches and judgments what might have been written, than to put their speeches and judgments into literary form" (p. 71).

when Stair's *Institutions*, the first systematic, authoritative treatment of Scots law, was published. The efforts of Mackenzie and other Scottish legal professionals should be understood as part of a broader European trend associated with the rise of the nation-state, when countries turned their attention away from commentaries on the civil law to the development of municipal law.<sup>29</sup>

As for pleading, advocates must have believed that at least sometimes eloquence was useless. The judicial system was known for corruption. Mackenzie mentions it in his inaugural oration for the Advocates' Library (p. 71), and legal historians concur that the corruption in the administration of justice throughout the seventeenth century was well known to contemporaries: judges and their families as well as court officials were bribed and intimidated by the Crown.<sup>30</sup> Legal historians also mention abuses of judicial eloquence, as advocates made lengthy speeches before both the civil and criminal courts.<sup>31</sup> Certainly there must have been motives for advocates to parade their so-called eloquence in law courts;<sup>32</sup> and Mackenzie's "What Eloquence" indicates some of them.

Mackenzie was first admitted to the Scottish bar in 1659. In 1661 his defense of the Marquis of Argyll, accused of high treason and brought before parliament, did not enable Argyll to escape conviction, but it did bring Mackenzie notice and advance his reputation.<sup>33</sup> He was promoted to Justice Depute in November 1661 and served until 1663. In the following years he continued his legal work, including defenses of accused witches,<sup>34</sup> and was active in the business of the Faculty of Advocates. He became advocate for the town of Dundee in 1665, was knighted in 1666, and was elected to parlia-

---

<sup>29</sup>Klaus Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries," trans. Sabine MacCormack, *Juridical Review* 17 (1972) p. 216.

<sup>30</sup>See, for example, Omond, *The Lord Advocates*, cit in n. 1 above, pp. 172–73; J. Irvine Smith, "Criminal Procedure," *An Introduction to Scottish Legal History*, p. 439 and "Rise," p. 46; and John Macpherson Pinkerton, "Introduction," *The Minute Book of the Faculty of Advocates: 1661–1712*, vol. 1 (Edinburgh: Stair Society, 1976) p. xiii.

<sup>31</sup>J. Irvine Smith, "Criminal Procedure," p. 439.

<sup>32</sup>Rajit S. Dosanjh, "The 'eloquence of the Bar': Hugh Blair's *Lectures*, professionalism and Scottish legal education," *The Scottish Invention of English Literature*, ed. Robert Crawford (Cambridge: Cambridge University Press, 1998) pp. 57–59 has also mentioned Mackenzie's interest in promoting the professional status of Scots advocates, as well as restricting the profession to a select few. Dosanjh focuses on knowledge as the excluding factor, and certainly eloquence could serve the same purpose.

<sup>33</sup>See Lang, *Sir George MacKenzie*, pp. 31–39 on the case and Mackenzie, *Pleadings*, pp. 80–84 for a defense speech.

<sup>34</sup>See *Pleadings*, pp. 84–89 for a defense speech.

ment in 1669.<sup>35</sup> Thus Mackenzie was active in high legal and political circles, and eloquence served in part as an entrée to these circles.

### CONTENTS OF "WHAT ELOQUENCE IS FIT FOR THE BAR"

According to the preface to *Pleadings*, Mackenzie composed the work "to inform Strangers as to our Way of Pleading in Scotland, to form to myself a Stile, and to give me an Easiness in Pleading" (p. 10). His comments on his own experiences as a young pleader (p. 10) and on common faults of young pleaders (p. 16) suggest an intended audience of advocates in the early stages of their careers.

"What Eloquence is fit for the Bar" is twenty-seven paragraphs in length. Mackenzie praises and defends judicial eloquence (§1–11); covers the traditional offices of the orator (§12–23), excluding memory and discussing them with respect to Scots law; and closes with an encomium to the Scottish tongue (§24), defense of modern eloquence (§25–26), and brief display of modesty (§27).

#### Praise and defense of judicial eloquence

Mackenzie's praise of judicial eloquence begins with praise of the advocate's eloquence over that of "Rivals for this great Honour" (p. 11). The advocate's eloquence is superior to that of courtiers and preachers because his topics are significant and he meets with real opposition. Against the opinions of some divines and philosophers, he argues that Scots law, with the variety of actions and circumstances and its statutes, customs, and cases, "must afford much Room for new and subtile Conclusions" (p. 12). Significantly, he remarks that those who prefer advocacy as a profession do so in "the joint Hopes of Glory, Applause, Preferment, Money and Emulation" (p. 12). Virtually absent are topics of civic significance; Mackenzie does not praise the advocate's eloquence for bolstering legal courts as an institution or for achieving justice, but for bringing the advocate personal fame and professional status.<sup>36</sup>

Mackenzie defends judicial eloquence against three charges. First, it cannot work for "old and reverend Judges" who are moved

---

<sup>35</sup>See Cairns, "Mackenzie," pp. 18–19; Lang, *Sir George MacKenzie*, pp. 78, 160.

<sup>36</sup>Mackenzie's "Idea eloquentiae forensis hodierni" also features professional competition in its defense of judicial eloquence (*Works*, pp. 105–06).



only "by solid Reason" (p. 12). Mackenzie attempts to dissociate eloquence from mere ornamentation and ties it to propriety of argument. When discussing statutes and authorities, the terms chosen should be "significant" and "seem full of the Thing which they are to express;" reasons are to be provided "handsomly;" debate on probable themes, inquiry into public utility, and discussion of presumptive arguments are to involve "a more florid and elegant Stile" (p. 12). Moreover, eloquence is sure to charm: the judge "must be very just, who is not somewhat brib'd by charming Expressions" (p. 12).<sup>37</sup>

Second, it should not be allowed in a court "since no Passions are allowed in judging, and the Object of that excellent Science being Truth, and not Humour" (p. 12). But, Mackenzie argues, eloquence enhances the advocate's ability to invent arguments because it "thaws" (p. 12) the speaker's faculties. The hearers are also "warm'd and thawed" by eloquence, and consequently more receptive to "Impressions" made by the speaker's eloquence (p. 12; see also p. 14). Mackenzie concedes that eloquence "should be pardon'd some little Dangerousness" since it "may bribe and corrupt Judges;" but he defends it on providential grounds: "Nor can I think but that Providence has ordain'd it for the Bar, to soften and sweeten Humours, which would else, by constant sticking at mere Law, become too rigid and severe, and to divert and ease the Spirits of both Judges and Advocates, which are too much upon the Rack, and bended for the Service of their Country" (p. 12).

Third, it is illegal by an Act of Sederunt prescribing syllogistic rather than rhetorical pleading (p. 12). Mackenzie blames the existence of this act on "the Ignorance of those Times" which blinded "even Italy and France" (p. 13). He places most of the blame for the act on the clerical membership of the Court at its institution and their clerical training: the court consisted "of an equal Number of Churchmen and Laics, and the President being an Ecclesiastic, these Churchmen having the Advantage of Learning and Authority, did form that Act of Sederunt according to their own breeding, by which they were tied to their Theology-schools to debate by Syllogisms" (pp. 12–13). Mackenzie illustrates the inappropriateness of syllogisms for arguing a case in part by distinguishing proper legal expression from expression in mathematics, medicine, natural philosophy, logic, metaphysics, and theology. The syllogism, he argues,

---

<sup>37</sup>See also Mackenzie's preface to *Arentina* where he describes eloquence as a way of making virtue palatable (p. 8).

is "very ridiculous, and impossible" for legal pleading (p. 13).<sup>38</sup> He concludes the argument by asking whether there "are any Creatures alive so litigious as some Divines and Philosophers, who debate only in Syllogisms?" (p. 13).

Mackenzie's last topic is copious pleading. He defends the "full and copious Way" (p. 13) of pleading in part with reference to classical Greek and Roman traditions of judicial speaking and to its practice in France "where Pleading is in its greatest Perfection" (p. 13). The pleader, he argues, should plead fully in order to not wrong his client and in order to make sure that at least one of his arguments appeals to each judge sitting in the Court of Session (pp. 13–14). Mackenzie recommends shorter pleading in the Outer House, where new decisions should not be made, and fuller pleading in the Inner House in cases "where the Cause is new and fertile" (p. 14).<sup>39</sup> Stepping outside these bounds can "vex an unwilling Judge, who will think that he loves not to hear, mere Affectation and Vanity" (p. 14). Affectation of copious eloquence as well as brevity could also lead to censure from fellow advocates. Mackenzie blames "Envy" as the reason why "Backbiters" inconsistently criticize the same pleader for "too luxurient" pleading "because in the Inner-house he used the full Allowance," and for being "a lazy Pleader" because "in the Outer-house he thought it impertinent to make Speeches, where a short Defence is only necessary" (p. 14).

### Offices of the orator

Invention and arrangement: Mackenzie's discussion of invention and arrangement does not follow the traditional order of exordium, narration, and so on, because these parts do not correspond to Scots legal procedure.<sup>40</sup> Mackenzie begins at the beginning of the process, distinguishing it from ancient and modern French practice. While ancient and French pleaders include a preface and epilogue, the Scottish pleader "relates only the Cause, which he is only allow'd

---

<sup>38</sup>Syllogisms apparently had a role in questions of the relevancy of an indictment. See J. Irvine Smith, "Criminal," p. 439.

<sup>39</sup>Briefly, the Court of Session consisted of an Outer House and an Inner House. In the Outer House, three of the fifteen Lords of Session sat in rotation and settled matters of evidence or procedure or minor questions. Other questions were sent to the Inner House, where all fifteen judges usually sat or at least nine which constituted a quorum.

<sup>40</sup>Mackenzie's Latin essay on judicial eloquence, in contrast, organizes arrangement around traditional heads. Mackenzie, *Works*, Vol. 1, pp. 108–10.

to adorn with a pertinent Representation of such Circumstances, as may best, either astruct the Justice of his own Pursuit, or obviate unnecessary Objections in his Opponent, but without mentioning any Thing pro or con, in jure" (p. 14). The defender then offers a short defense. If its relevance is contested in a full reply, then the defense makes a full answer. Mackenzie notes that the debate usually ends at this point, although some causes require additional replies and duplies, and "the Discourses become too thin and subtle, and the Judges weary" (p. 14). In the replies or duplies, pleaders may use a short preface for important causes, as long as it is relevant to the case itself rather than a commonplace such as an excuse for the speaker's weakness. Mackenzie's recommendations for arranging arguments are to put together "such Arguments as have Contingency" and those founded on the same general principle. He recommends beginning with those that best clear a matter of fact or "tend most to illuminate the Subject of the Discourse" (p. 15).

The next part of the procedure is answering the arguments. Mackenzie blames "the Aristotelic Way of arguing in the Schools" (p. 15) for the custom of repeating the arguments which will be answered because it takes time and wearies judges. He then notes variations in how the answerer orders the arguments: he could follow the method of the proposer, reorder the method, urge his own arguments first, and so on. He recommends occasions when the strongest arguments should be placed first, that related arguments be kept together, and that "mysterious Arguments" be left until last "when Judges have fully master'd the Case" (p. 16).

Mackenzie's report of the epilogue first notes that it "is ordinarily, In respect whereof, the Defence ought to be admitted, or repell'd, &c. But in some solemn Cases the Pleader may recapitulate shortly his strongest Arguments, or may urge the Favour and Merits of the Cause" (p. 16).

Delivery: Mackenzie observes that in the past delivery was "one of the chief Ornaments of Speech ... But now the World is become too wise to be taken by the Eye, albeit I confess these add Grace, tho' not Force" (p. 16). He confesses that Scottish delivery "is possibly too violent, which I ascribe both to the violent Temper of our Nation, *praeservidum* Scotorum *ingenium*, and to the Way of our Debate" (p. 16). Mackenzie provides the traditional lore that a speaker who does not show passion cannot raise it in others, but does so in the non-traditional language of physiology: since "Passion does disorder very much the kindled Speaker," those with "hot and choleric Spirits should calm themselves before they adventure to enter upon a serious Debate," "the bashful" should be "warm'd, and ... lose

prudently a little of their indiscreet Modesty," and "Melancholic Persons" also "need to be a little fretted" (p. 16). Passion also prevents those who fear interruption from stammering, because passion keeps the speaker focused on what he is speaking (p. 16). Mackenzie recommends against railing and displays of fury, but notes cases where "not to be severe were Prevarication" (p. 16).

Style: Mackenzie covers the subject in three paragraphs. The first makes four recommendations. Speakers should not be too subtle, and they should avoid citations, parentheses, and frequent repetition of "the ordinary Compellations; such as, My Lord Chancellor, or My Lord President" (p. 16). The second again recommends a copious style over a laconic. The third indicates cultural competition between advocates and gentlemen. He observes that "Many who are not Friends to the Bar, inveigh much at the canting Terms which they say is us'd there"—namely, those "Gentlemen" who "speak in their canting Terms of Hunting, Hawking, Dancing" (p. 17). But, argues Mackenzie, "every Science has its particular Terms, and it were Pedantry to substitute others in their Place" (p. 17). Mackenzie's discussion of appropriate terms extends to using appropriate Latin terms and "the genuin Words of our Municipal Law" (p. 17).

### Encomium to the Scottish tongue

Mackenzie compares the Scottish tongue to the English and French. He lists reasons why "the Scottish Idiom of the British Tongue is more fit for Pleading, than either the English Idiom or the French Tongue" (p. 17). Mackenzie suggests that the Scottish have a national character appropriate for pleading, "for certainly a Pleader must use a brisk, smart, and quick Way of speaking; whereas the English, who are a grave Nation, use a too slow and grave Pronunciation, and the French a too soft and effeminate one. And therefore, I think the English is fit for Haranguing, the French for Complementing, but the Scots for Pleading" (p. 17). Mackenzie then links national character to national institutions: "Our Pronunciation is like ourselves, firely, abrupt, sprightly, and bold; their greatest Wits being employ'd at Court, have indeed enrich'd very much their Language as to Conversation; but all our's bending themselves to study the Law, the chief Science in Repute with us, hath much smooth'd our Language, as to Pleading" (p. 17). Scots law, he suggests, offers more scope for eloquence than English law with its full and authoritative statutes and decisions.

Mackenzie compares the idioms of people of the same social level in Scotland and England: "Nor can I enough admire, why some of the wanton English undervalue so much our Idiom, since that of our Gentry differs little from their's; nor do our Commons speak so rudely as these of Yorkshire" (p. 17). He then associates with French those words in Scottish which differ from English, such as "*Cannel* for *Cinnamon*, and *Servit* for *Napkin*," because "if the *French* Tongue be at least equal to the *English*, I see not why our's should be worse than it" (p. 17).

After noting that the Scottish accent "is natural, and has nothing, at least little, in it that is peculiar" (p. 17) and that it allows Scots to pronounce foreign languages including Latin best, he concludes with a disclaimer: "I say this not to asperse the English, they are a Nation I honour, but to reprove the petulancy and Malice of some amongst them, who think they do their Country good Service when they reproach our's" (p. 17). Certainly, though, Mackenzie wants to bolster the status of Scots by suggesting that their eloquence is equal if not superior to that of their rivals.

#### Ancients versus moderns

Mackenzie answers those who claim that eloquence has declined since Cicero's time, objecting to those "Pedants" who "make Cicero the Standard" (p. 17). Mackenzie argues that eloquence improves over time as people become wiser with age, because it improves by practice and, through experience, we learn the humors of the audience better, we learn what forms and sounds please most, and new inventions are added to those of the last age (p. 17). Mackenzie admits that the ancients had greater subjects and occasions for eloquence, but answers that it is possible to speak well on lesser subjects and occasions. He also suggests features of the Scottish legal system—more laws, parallels, and citations—which provide more scope for eloquence than ancient legal systems. Finally, he argues that monarchy promotes eloquence more than commonwealths: he has "not seen any *Switzer*, or *Hollander*, so eloquent as the *English* or *French*," and in a commonwealth those who attempt "to rise above the Vulgar are carefully depress'd, and sunk down to a Level" (p. 18). Given that Mackenzie had lived through the Commonwealth, Protectorate, and Restoration, political motives must be at work here. In addition, we see a desire to maintain social hierarchy and eloquence as a marker of status.

## CONCLUSION

In the years following the publication of *Pleadings*, Mackenzie continued to advance in his career. He was appointed King's Advocate in 1677. At this time he earned his nickname of "bluidy Mackenzie" for prosecution of covenanters. In 1678 he published an important work on Scottish criminal law, in 1681 he published *Idea eloquentiae forensis hodierni*, and in 1682 he became Dean of the Faculty of Advocates. In 1688 he published his *Institutions of the Law of Scotland* and in 1689 gave the inaugural oration at the formation of the Advocates' Library, later the National Library of Scotland. In this oration Mackenzie identifies rhetoric as one of the handmaidens of jurisprudence.<sup>41</sup> Mackenzie went to Oxford shortly thereafter as he was strongly identified with the governments of Charles II and James VII. He died in 1691, the year when his *Vindication of the Government in Scotland. During the Reign of King Charles II* was published. Thus Mackenzie's legal and political career and writings continued, as well as his attention to and practice of eloquence. His career indicates that its personal, professional, and political stakes were high.

The survey of Mackenzie's "What Eloquence is Fit for the Bar" shows that Mackenzie is less interested in bolstering the credibility of legal institutions than in promoting the status of Scots advocates against their rivals at court and in the schools and pulpits, and against their rivals in England. Judicial eloquence in post-Restoration Scotland was a site of struggle for individual and professional status. It was also part of a struggle for national, cultural identity and status vis-à-vis England.

---

<sup>41</sup>See his inaugural oration, p. 73.